Filed 4/10/09 P. v. Pappadopoulos CA1/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DEMETRI CHRIS PAPPADOPOULOS, Defendant and Appellant.	A117925 (Alameda County Super. Ct. No. CH-40671)

Appellant Demetri Chris Pappadopoulos, defendant below, seeks reversal of his conviction for attempted rape of an unconscious person, to set aside the court's restitution order, and remand for further proceedings. We affirm the judgment.

BACKGROUND

In April 2006, the Alameda County District Attorney charged defendant by information with rape of an unconscious person (Pen. Code, § 261, subd. (a)(4)). The subsequent jury trial centered around events occurring on the evening of Sunday, March 27, 2005, when 11 friends, including defendant and Maria Doe (hereafter Maria), traveled by hired limousine from Sacramento, California, to Fremont, California, to attend a concert.

The Prosecution's Evidence

Jason Smith's Testimony

Jason Smith, the limousine driver, testified that at rest stops along the way to Fremont one woman passenger appeared more intoxicated than the other passengers, and

seemed to pass out by the third stop. Smith noticed vomit on the outside of the limousine. At the concert hall, everyone but the woman left the limousine. Smith did not see her move, open her eyes, or speak, and she seemed to be unconscious. Smith told defendant that he would take care of her, but defendant said to wait there because he was tired and wanted to return to nap. He returned one minute later. Smith, who held the door open for him, did not see the woman move.

At defendant's request, Smith started to drive around. The solid partition between the driver and passenger areas went down about 20 seconds later. Smith saw in the mirror that defendant was kneeling between the woman's bare legs. From the look on her face, she was still unconscious, and was where Smith had last seen her, on one of the two rear benches. Smith, who was about eight or nine feet away, saw defendant drop his pants and underwear, move his hips closer to the woman's pelvic area, and move his pelvic area back and forth against her. Smith heard skin slapping, and thought defendant was having sex with the woman, who did not make any sounds, move her legs or head, or open her eyes, and had her hands spread out in each direction. At one point, the woman appeared to raise her right arm and put it on defendant's forearm, but did not otherwise move it. Other than the movement of her hand, Smith did not notice anything that led him to believe she was awake. He felt uncomfortable and put up the partition after less than a minute total of looking in the mirror. Within five minutes, defendant told Smith to go back to the concert hall, where defendant exited the limousine.

Smith testified on direct examination that he parked the limousine and started cleaning up inside for about 45 minutes. He did not see the woman, who was now laying in a fetal position on the "J-bench," move or hear her make noises. He drove to a fast food restaurant, and asked with a yell if she wanted anything. She replied with a very faint "no." On cross-examination, he said he was not sure if he cleaned up the limousine before or after he went to a fast food restaurant for some food, answered affirmatively when asked if he went to the fast food restaurant first, about eight minutes after dropping off defendant, and stated that Maria very faintly answered his question about food. On redirect examination, he testified that in his initial statement to Sergeant Links of the

Sacramento Sheriff's Office, he had indicated that he cleaned up the limousine first, that he had so testified at the preliminary hearing, and that he had also testified at that hearing that it was " 'likely the most accurate way it happened.' "

Smith, who knew defendant from previous rides, called defendant's brother, George Pappadopoulos (George), to find out the woman's name, whether she was dating defendant, and if this was regular behavior between them. He told George that defendant had just had sex with an unconscious passenger. George said her name was "Karly," whom defendant had dated at one time, and that an occasional encounter like this was normal. Smith did not think it was Karly and, after his further description of the woman, George said she was "Lexie." Smith ended the call and went to a drugstore to get a snack, two and a half hours after defendant had left. When Smith asked the woman if he could get her anything, she said, "I'm good."

About 1:00 a.m., Smith picked up defendant, who got into the back of the limousine with the partition up. After awhile, Smith heard him say something like "what the fuck," or "why the fuck." About 20 minutes later, Smith lowered the partition and saw defendant sleeping on one seat and the woman on the "J-seat." He heard her answer a call by saying, "This is Maria." About 1:30 a.m., others returned and the woman talked and sounded normal.

Eventually, Smith drove the group back to Sacramento, where the woman told him her name was Maria, and he told this to George. At the end of the ride, he described what had happened to Peter Cononelos, the passenger who had hired the limousine, and the next day told his own boss, Doug Dean. He agreed to keep it quiet for the moment at Cononelos's request.

That Wednesday, Smith told George and a former police officer, Leo Lagesse, what had happened, and told Maria when she called him the next day. He received a call from Links and later gave her a statement. Smith continued over time to talk to George. George told Smith at one point that he had read Smith's statement to police and asked Smith why he had said something that was untrue; insisted that Smith had told him that

Maria had rubbed defendant's forearm and moaned and groaned during sex; and, later, told Smith that defendant and Maria had an "ongoing relationship."

In July 2005, Smith gave a limousine ride to Karly Urata. Smith understood Urata previously had been involved with defendant. Urata told him that defendant had been seeing Maria for three years, which could be proven by phone records, and that "it" was a big misunderstanding. Smith also ran into Cononelos, who also told him about a relationship between Maria and defendant. Smith emailed Links that he had learned defendant and Maria had an ongoing relationship and that he might have been mistaken about what he had seen. He told Dean that he wanted to "try backing out" of the case. At Dean's suggestion, he contacted defendant's attorney.

Soon thereafter, also in July 2005, Smith received a telephone call from Detective Willett of the Fremont Police Department, and spoke to Links the following week. Smith declared to Links that he no longer had doubts about his testimony. Both Willett's call and Links' conversation with Smith were recorded. Before trial, defendant moved in limine for remedies, including dismissal of the case and exclusion of Smith's testimony, for purported misconduct by Willett and Links in these contacts. The court found that Willett had committed misconduct, and ordered as remedies that Willett was barred from further contact with any witnesses, the jury would be told that misconduct had occurred, and the jury would be allowed to consider the recorded telephone call with certain instructions. We discuss these matters further in part II, *post*.

Maria's Testimony

Maria testified that she and defendant had been friends and had sexual intercourse once in May 2001. They did not have sex again and she did not have that type of interest in him, but talked to him occasionally. She testified, based on a summary of her phone records that she had prepared, that she made 29 calls to defendant between February 9, 2001, and May 23, 2001, and four calls to him in the remainder of that year; although he would continue to call her, she would not take his calls. She ran into defendant occasionally at Greek functions, and he would whisper to her in person and tell her in limited phone calls, "I want to fuck your brains out." She wanted nothing to do with him.

She testified that, based on her summary, she made one call to him in 2002, none in 2003 and 2004, and one in 2005. She ran into him once in 2004, saw him at a party in early 2005, and returned his call in 2005, at which time he sounded drunk and belligerent, and asked if they could "go have sex," which she refused. She was not having an ongoing affair with him as of March 27, 2005.

During the limousine ride to Fremont, Maria sat next to defendant to distract him from his "limo-surfing" outside the sunroof while the vehicle was moving. After drinking about three and a half vodka mixed drinks that evening, she began to feel nauseated at a rest stop. When she sat next to defendant again, he put his arm around her and felt her "butt." She threw up in the limousine, and did not recall anything else until someone asked her later about going to Walgreen's. She remembered hearing defendant's voice and receiving a phone call from another passenger, Elaine Polyzos, who said the concert was over.

On the day of the incident, Maria was taking a five milligram dosage of an antidepressant, Lexipro, which came with a warning that it might cause drowsiness and should not be combined with alcohol. She had combined it with alcohol before and had not felt sick or lost consciousness.

Two days later, Polyzos and Lagesse told her what had happened. She reacted with shock and disbelief. She reached Jason Smith, who told her that she had been "taken advantage of." With Lagesse's help, she met with Links the next morning and told her about her 2001 involvement with defendant, which she had not told to anyone else. She gave police the clothing she had worn to the concert. She also spoke with George, who said what his brother had done was "wrong," and apologized on his brother's behalf.

Other Testimony

Eleanor Salmon, a forensic scientist, testified that she found sperm cells on the exterior crotch area and along the seam of the right leg hole of a pair of women's underwear that Willett had given to her. The DNA profiles matched that of defendant's epithelial sample.

Cononelos testified that between 2000 and 2004, he had seen defendant and Maria together in night clubs engaging in "dirty dancing," and leaving together on occasion. He saw Maria flirt with defendant regularly. Cononelos ran into Smith after the incident and told him there "was an ongoing affair" between Maria and defendant, and that Maria had admitted this to someone else. Cononelos testified that Smith said he was going to withdraw his statement to the police, who had lied to him when they said defendant and Maria had no prior relationship.

Mark Tzikas, one of the limousine passengers, testified that Maria vomited on the way to Fremont, but that she and defendant later kissed twice. When they reached the concert hall, Maria was awake, able to speak and coherent, but did not look well enough to go to the concert. Tzikas did not know anything had happened until a few days after the concert. After George called him and asked who defendant had sex with that night, Tzikas talked to defendant, who told him that Maria did not remember it, but admitted that "something" had happened in the limousine, and that there was a "prior relationship."

Polyzos testified that she was best friends with Maria, who was taking antidepressants at the time of the incident. Before the concert, Maria told Polyzos that Maria's husband, from whom she had been legally separated for four years, would be at the concert with his girlfriend and Maria was going to flirt with defendant to make him jealous. On the way to Fremont, Maria vomited, but Polyzos did not see her kiss defendant. When they reached the concert hall, Maria was sleeping and did not get out of the limousine. She understood from passenger Dessie Paraskevas that Maria was not going in, and from another passenger, Tony Xirouhakis, that Maria had said she was going to stay in the limousine. Soon after the incident, Polyzos called Maria to tell her about the allegations. Maria was shocked and said, "There's no way. It just didn't happen. I don't feel any differently. I'm okay. That's not possible." At first, Maria denied having a prior relationship with defendant, but a day or two later said she had slept with him one time several years earlier.

Dessie Paraskevas testified that just before the limousine arrived in Fremont, Dessie told Maria, "We're almost there," and asked, "Are you coming," to which Maria responded, "I just want to sleep." At the hall, everyone got out but Maria, who was asleep, and seemed to Dessie to be "passed out" drunk. Dessie was concerned, but everyone said she would be okay, and Dessie thought it would be okay because the driver was a friend and Maria had passed out once before after drinking too much at a club.

Demetre Paraskevas, Dessie's brother and another passenger, testified that when the limousine arrived at the hall, Maria was laying down and "out of it."

Leo Lagesse, who was not at the concert, testified that a few days after the incident George said to him, "Did you hear what my brother did now?" Lagesse talked with Maria, who was like a sister to him, and contacted the police about making a report. He also said George told him that Cononelos and Tzikas knew that it was Maria who had been raped in the limousine. He later had a verbal confrontation with Cononelos and Tzikas for spreading rumors about him and his wife, and that he was having an affair with Maria, but did not tell them to change their statements about the incident.

Willett testified that he and his partner investigated the incident. After he received a copy of Smith's email to Links, he called Smith and talked about whether he had been bribed or "tampered with," and about perjury. He recorded the call to lock Smith down to the story that Willett saw in the "puzzle" in his mind. Willett had tentatively made up his mind about how things had "gone down" between defendant and Maria. He did not threaten Smith, but merely told him what he could do legally.

Defense Evidence

Tony Xirouhakis, another passenger, testified that defendant and Maria hugged and did "a little more than just kissing" during the ride to Fremont. Maria seemed drunk and threw up at least twice. She said she did not want to go to the concert because she was not feeling well, and grabbed defendant's arm and talked to him as the others went inside. Defendant declined to sit down in the hall, saying Maria wanted him to go back. After the concert, Xirouhakis found Maria lying down and defendant asleep in the back of the limousine. On the way back, Maria seemed happy. Xirouhakis had about five

drinks in the limousine, 10 at the concert, and another on the way back. Everyone seemed tipsy.

Xirouhakis had seen defendant and Maria together in public starting in 2002 and ending about four or five months before the concert, and they seemed very close. Xirouhakis also spoke to Lagesse, who seemed obsessed with the incident. He later saw Lagesse call Tsikas and Cononelos names, point his finger like a gun at the two, and say, "after Demetri, you're both next."

George testified that he talked by phone with Smith several times in the evening of March 27, 2005, the first time at 7:15 p.m., when Smith said he had seen defendant "piling" or "doing" a girl. At George's request, Smith met with George and George's mother a few days later, and Smith said Maria had moaned and groaned and rubbed defendant's forearm during sex with him.

Karly Urata, who testified that she had been defendant's girlfriend until April 2002, said that Smith told her during a July 2005 limousine ride that he knew she was defendant's friend and that, although Maria had told him she had never been with defendant, he had learned that they had had a relationship. Maria had told him that defendant had raped her in the limousine and that, although he thought defendant was respectable and did not suspect he would do so, Smith "went along with it." He did not feel comfortable testifying now and was going to call someone to say that he wanted to be "pulled from the case."

George Faris testified that between 2000 and 2003, when he worked with defendant, he saw defendant and Maria, whose name he understood to be "Sabrina," together about 10 or 15 times.

The jury found defendant guilty as charged. The court reduced his conviction to attempted rape of an unconscious person, and sentenced him to a three-year state prison term. Defendant filed a timely notice of appeal.

DISCUSSION

I. *The Lack of Instruction Regarding Mistake of Fact*

Defendant argues the trial court committed prejudicial error by not instructing the jury sua sponte regarding a mistake of fact defense. This is incorrect.

Defendant was charged with violating Penal Code section 261, subdivision (a)(4), which provides in relevant part that rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, "[w]here a person is at the time unconscious of the nature of the act, and this is known to the accused." (Pen. Code, § 261, subd. (a)(4).) "[U]nconscious of the nature of the act" means incapable of resisting because the victim was either "unconscious or asleep," or "[w]as not aware, knowing, perceiving, or cognizant that the act occurred." (*Id*., subds. (a)(4)(A) & (B).)

In criminal cases, the trial court must instruct the jury on the general principles of law relevant to the issues raised by the evidence, even if no request is made. (*People v. Sedeno* (1974) 10 Cal.3d 703, 716.) The court has a duty to instruct sua sponte " 'only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense *and* the defense is not inconsistent with the defendant's theory of the case.' " (*People v. Breverman* (1998) 19 Cal.4th 142, 157.)

As defendant acknowledges, at trial he did not contend that he mistakenly believed Maria was not unconscious, but instead contended that the evidence was insufficient to show her unconsciousness beyond a reasonable doubt. Therefore, he must show that substantial evidence exists to merit a sua sponte mistake of fact defense instruction. Substantial evidence is " 'evidence sufficient for a reasonable jury to find in favor of the defendant . . . . In determining whether the evidence is sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defense evidence, but only whether "there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt . . . ." ' " (*People v. Mentch* (2008) 45 Cal.4th 274, 288, quoting *People v. Salas* (2006) 37 Cal.4th 967, 982.) "On appeal, we likewise ask only whether the requested instruction was supported by substantial evidence—evidence that, if believed by a rational jury, would have raised a reasonable doubt . . . ." (*People v. Mentch*, *supra*,

at p. 288.) A trial court must give such an instruction "only when the defense is supported by . . . evidence sufficient to 'deserve consideration by the jury,' not 'whenever *any* evidence is presented, no matter how weak.' " (*People v. Williams* (1992) 4 Cal.4th 354, 361.)

Evidence substantial enough to support a mistake of fact defense instruction was not presented. Defendant argues there is substantial evidence based on Maria's arm movement during the sex acts, and the recollections of Dessie Paraskevas, Tzikas, and Xirouhakis. Smith's testimony about Maria's arm movement was of little, if any, significance. Smith testified that Maria appeared to be unconscious, that she did not otherwise move, and did not open her eyes, move her legs or head, or make any sounds. Viewed in the context of this testimony as a whole, his recollection that Maria moved her hand to defendant's forearm, but did not otherwise move it, is not substantial evidence that she was not "unconscious of the nature" of defendant's acts, or that defendant could reasonably mistake her condition as being conscious. (Pen. Code, § 261, subd. (a)(4).)

Dessie Paraskevas's testimony also is not substantial evidence. Defendant points to her testimony that Maria spoke to her just before they arrived in Fremont. However, she also testified that Maria was "passed out" drunk when they arrived at the concert hall.

Defendant also cannot rely on Tzikas's or Xirouhakis's testimony. Neither testified about Maria's condition, or what defendant observed about her condition, after they left the limousine. Thus, their testimony reveals nothing about Maria's state of consciousness, defendant's belief regarding it, or the reasonableness of any such belief, after defendant returned to the limousine. Also, while Tzikas stated that Maria was awake and able to speak coherently when they arrived at the concert hall, he also stated that she did not look well enough to go to the concert. Similarly, while Xirouhakis testified that Maria grabbed defendant's arm and talked to him as the others went inside, and that defendant said in the hall that Maria wanted him to return, he also testified that Maria said she did not want to attend the concert because she was not feeling well.

In short, defendant does not cite to substantial evidence that required the trial court sua sponte to instruct the jury on mistake of fact. The lack of such an instruction is not a ground for reversal of the judgment.[1]

II. *Willett's Misconduct*

Before trial, the trial court found that Willett made threats to Smith in their July 2005 telephone conversation that violated defendant's constitutional rights to present witness testimony favorable to his defense and to due process, and ordered certain remedies. Defendant argues that the court prejudicially erred when it denied his motion to dismiss the case or preclude Smith from testifying based on this misconduct.

A. *Background*

As we have discussed, Smith gave a statement to Links soon after the March 27, 2005 incident about what he had witnessed. He later heard from George, Urata, and Cononelos that defendant and Maria had a relationship, and on July 15, 2005, sent the following e-mail to Links:

"Jason Smith here. Very, very sorry about this but I think I may have made a terrible mistake with the statement I gave you about [defendant] assaulting a female in the back of my limousine. I have been informed by some members of the Greek community that Maria has actually been cheating on her husband for the last couple of years with [defendant] and has admitted this to her best friend and her husband. Knowing this information now and after reading in the paper that Maria's drug test was inconclusive, I now believe that she actually was aware of what was happening to her at the time despite her seeming to be not in control.

"After hearing all of this I now feel I shouldn't be a part of this investigation any longer. I feel like I may be participating in an effort to send a man to prison because Maria was embarrassed about word getting out about her and [defendant's] relationship. I truly apologize for all the trouble this caused and I feel awful about it. I would never

[1] In light of our conclusion, we do not address the parties' arguments further, such as whether or not any error by the trial court was harmless.

intentionally lie about anyone to get them into trouble with the law and I didn't feel I was doing that when I gave you my statement, but now that I've heard this new information about Maria the situation has changed. You may want to interview her again."

On July 21, 2005, Willett called Smith and recorded their conversation, without Smith's knowledge. When Willett asked at the beginning of the conversation if, in effect, Smith wanted to change his statement, the latter said that "I saw what I saw, I thought I saw a rape being committed," and that while it "certainly looked like" a rape, "now I'm finding out that the girl involved has been actually been running around on her husband with the guy who I thought was raping her at the time."

Willett responded that Smith had talked to people who were on defendant's side, and that defendant was worried because he was facing a big charge and refused to tell Willett his side of the story. He told Smith that having sex with a woman who is passed out is rape, even if she is married to the person, and that if Smith changed his story he "could" get arrested for perjury because it would indicate he had initially given the police "false information the first time around." He also said that "technically" if someone helps a person committing a rape by driving him without stopping what he knows to be a rape, he is an accomplice to it, and that if "you're gravitating to the other side, you're in a bad position to do that because we've got you by your gonads regards to any kind of now changing your story." Willett said he knew Smith had talked to Cononelos, who was defendant's friend and engaging in a cover-up, and to defendant's girlfriend, who would lie for him. He repeated that "if you start changing your story . . . you're going to get in some big trouble and then we turn around — go for a case on you for false report and perjury . . . ."

After some more discussion, Willett said that "we need your testimony, we need you to be honest. I don't want to see you get in trouble. I mean in trouble in the terms of trying to say, 'no, you didn't see what you say and no it wasn't a rape or anything like that.['] That totally changes your story." He also said that he had interviewed 12 or 13 people, that the interviews were "like pieces to a jigsaw puzzle," that Smith's original statement was "believable because it fits the story I am seeing with my jigsaw puzzle,"

that it would be unbelievable for Smith to change his story at this point, and that, "you're on our side, well stay on our side, wouldn't you please." When Smith said he was leaving his job soon, Willett offered to recommend him, "especially if we win this case," and that Smith could put him down as a reference.

In the course of their conversation, Smith said that he gave the message to Links "because, as you can imagine, when I hear things from . . . the other side, cause, it becomes all really confusing to me," and then stated, "is it really what I say, I mean gosh. Was she really out or was she just really laying still or was she feeling tired and sick and just letting it hap—I mean, I don't know[.]" Smith also brought up that George was telling him that he, Smith, had previously told George that Maria had been rubbing her hand up and down defendant's forearm, and moaning during the sex acts in the limousine, but that he, Smith, did not remember saying such things to George. Smith told Willett some of his recollections of what had occurred, including that he never saw Maria open her eyes, and that she seemed like a rag doll.

The next week, Smith spoke to Links and two investigators of witness tampering. He told them that he had decided not to retract his statement after talking separately to Willett and Lagesse, that he did not have any more doubts, and that the "right people" had gotten back to him.

Smith testified at a subsequent preliminary examination hearing, with Willett present at the prosecution table for at least some part of that time. Smith answered in the negative when asked if he had been threatened in order to get him to testify in a certain way, ever been made to feel uncomfortable in attempts to get him to testify in a certain way, ever been told that he was a member of a "team," or ever been told that he would be given a good job recommendation if he testified in a certain way.

B. *The Proceedings Below*

Before the trial, defendant moved to exclude the police officers from the courtroom during testimony and from contacting any witnesses, and to suppress Smith's testimony, because of "extreme and outrageous" police misconduct. The court subsequently referred counsel to *In re Martin* (1987) 44 Cal.3d 1 (*Martin*), for the

relevant legal guidelines, and the parties focused on Smith's July 2005 email to Links, and Willett's and Link's subsequent conversations with him. Among other things, defendant sought dismissal, or the exclusion of Smith's testimony, as remedies for Willett's claimed violation of his Sixth Amendment and due process rights, and pursuant to Penal Code section 1385.

The court considered evidence and testimony, although neither Smith nor Willett testified, and heard argument. It found that Smith was an "absolutely critical witness for the prosecution of this case" who had given an indication of "what is generally referred to in the business as that he may be going sideways." It found it hard to tell if Smith had actually intended to change his testimony because there was an ambiguity in his emailed statement to Links that, upon being " 'informed' " that Maria had been cheating on her husband and reading that Maria's drug test was inconclusive, " 'I now believe she actually was aware of what happened to her at the time despite her seeming to be not in control.' " The court continued: "And that's why inquiry by the police was certainly appropriate; calling Jason Smith, asking him, 'What's going on here? Who did you talk to? What did they tell you?' And perhaps most importantly an effort could have been made to perhaps encourage the witness to do what witnesses are supposed to do, which is to tell us the facts. [¶] To be blunt, Jason Smith's opinion of what occurred that night in that limousine is simply not admissible. What he needs to do is tell us the facts."

The court also observed that if Smith had really been going to contradict his previous story, the court was not at all certain it would have been inappropriate for a police investigator to point out that giving a false statement to the police was in fact a crime. The court continued, "All that being said, that isn't what happened here. We didn't have an investigator doing an investigation." It found Willett had acted with an "utter absence of any investigative intent" in the phone call, and had made only "the most perfunctory inquiry" into what was troubling Smith before delivering a "long monologue" that had included "more than one direct threat to prosecute should Jason Smith in any way change what he has said previously." The court found that Willett's

threats had affected Smith, as seen by the contradictions between the recorded phone call and Smith's preliminary examination testimony.

The court then reviewed the facts in light of the test outlined in *Martin*, *supra*, 44 Cal.3d 1. In *Martin*, the California Supreme Court considered what constituted government interference with a criminal defendant's right to have compulsory process for obtaining witnesses in his favor pursuant to the Sixth Amendment of the federal Constitution, and to the California Constitution. (*Id.* at pp. 29, 32-51.) A prosecutor had warned attorneys for several defense witnesses that the witnesses would be prosecuted if they implicated themselves in any crime during their testimony, but prosecution witnesses had not received such warnings. (*Id*. at pp. 34, 36-39.) Immediately after the first defense witness testified, a prosecution investigator arrested him in the hallway outside the courtroom in the presence of three prospective defense witnesses and at least one press representative. (*Id*. at pp. 20, 28, 35.) Three other defense witnesses then refused to testify. (*Id*. at pp. 20-21.) The defendant petitioned the Supreme Court for a writ of habeas corpus, and the court-appointed referee found the three defense witnesses had refused due to prosecutorial intimidation. (*Id*. at pp. 26-28.)

The Supreme Court held that a criminal defendant seeking to establish the subject constitutional violation must show three things, namely, that the government agent engaged in activity that was wholly unnecessary to the proper performance of duties and of such character as to transform a defense witness from a willing witness to one who would refuse to testify; the existence of a substantial causal link between the misconduct and the defendant's inability to present witnesses on his or her own behalf; and " 'materiality,' " meaning a " 'plausible showing' " under federal law, and a "reasonable possibility" under state law, that the testimony of the witness would have been material and favorable to his or her defense. (*Martin*, *supra*, 44 Cal.3d at pp. 31-32.) The existence of bad faith or improper motives on the part of the government agent is not required. (*Id*. at p. 35.) The high court accepted the referee's findings, and found that Martin had established these three elements, and that a constitutional violation had occurred. (*Id*. at pp. 32-51.) In particular, it found improper the time, place, and manner

of the arrest (*id*. at p. 36), the prosecution investigator's and prosecutor's threats to other defense witnesses to the effect that they too would be arrested (*id*. at pp. 36-51), and the giving of warnings to defense witnesses only (*id*. at p. 37).

The Supreme Court did not resolve the question of whether the constitutional violation was prejudicial per se, but determined the existence of prejudicial error under both the federal and state standards. (*Martin, supra*, 44 Cal.3d at pp. 51-52.) Nonetheless, it rejected Martin's request for dismissal. Among other things, it determined that, assuming for the sake of argument that the prosecution's misconduct violated Martin's due process rights, he nonetheless "fail[ed] to establish that the prosecutorial misconduct . . . , although undeniably serious, was sufficiently 'outrageous' or 'gross' to justify" dismissal of his case. (*Id.* at p. 55.) For this same reason, the court also rejected Martin's argument that dismissal was appropriate under Penal Code section 1385 "in furtherance of justice." (*Ibid*.) The court merely granted Martin's petition and vacated the judgment (*Martin, supra*, at p. 56), which did not restrict the People from placing Martin on trial again.

In the present case, the trial court found that Willett had engaged in the requisite misconduct because "the manner in which Detective Willett approached Jason Smith was in fact wholly unnecessary to the performance of his duties." It noted that, while it was "not a matter of transforming a witness from a willing witness to one who would refuse to testify," it was "a matter of at least arguably transforming [Smith] from a witness who has some concern about what to testify about and what was seen to one who indicates no hesitancy or doubt at all."

The trial court also found a causal link between Willett's misconduct and defendant's inability to present witnesses on his behalf, pointing to Smith's comment to Links that "the right people" had talked to him and his preliminary examination testimony, which the court found to be inconsistent with what was said in Smith's phone conversation with Willett.

As for materiality, the trial court, after stating that "Jason Smith is a terribly important witness to both sides, added: "I'm not sure that the defense can show that the

testimony would be favorable to his defense. This is problematic. As I've indicated, the statement in the e-mail is somewhat ambiguous. We don't know what he would have said. On the face of it, I think it's quite possible that with appropriate inquiry it would have been found that in fact there wasn't anything that was particularly favorable to the defense, that it dealt with extraneous matters and that his actual observations never changed. [¶] The problem and the point that the defense raises and argues is that we can't know, and we can't know because of the misconduct of [Willett]."

The court stated that, although it did not think Willett "understood that there was anything wrong" with his actions in the recorded call with Smith, "I don't have any particular problem in this case finding that there was prosecutorial misconduct, as that term is used in the *Martin* case. I think the parallels are simply too great and too many." The court did not find that Links had committed misconduct.

The court then turned to remedies. It found that Willett's misconduct was not sufficiently "outrageous" or "gross" to justify dismissal and prevent the case from being heard by a jury, or to prevent Smith from testifying. The court ruled that, if Smith testified, it would instruct the jury that in fact there was misconduct, that this misconduct was improper as a matter of law, that it was a factor that they could consider in evaluating the testimony, and that the weight of it was for them to determine. The court also ordered that Willett no longer be the investigator in the case, and not have contact with any witness, and that Links, although she did not necessarily engage in misconduct, also have no contact with Smith "in order to try to provide a fair trial at this state of the proceedings."

The court subsequently instructed the jury consistent with its ruling before the prosecutor played the recording of the telephone conversation, and when the court gave the jury its instructions.[2] Smith was also questioned extensively about his conversation with Willett.

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[2] Before the tape was played, the court told the jury: "I am reiterating what I've told you previously about things not admitted for the truth of what is stated. [¶] The

C. *Discussion*

Defendant challenges the court's remedies, but not its finding of misconduct, while the People challenge the court's finding of misconduct, but not its remedies. We question whether or not Willett committed misconduct under the analytical framework adopted by the trial court, but need not resolve the matter because the court's remedies were sufficient to address any such misconduct.

To determine whether or not Willett had engaged in the misconduct alleged, the court applied the three-step analysis in *Martin, supra,* 44 Cal.3d 1, under which the defendant must show misconduct, the misconduct's substantial causal link to the loss of testimony, and the "materiality" of the lost testimony to defendant's case. (*Id*. at pp. 31-32.) We have no reason to disagree with the court's conclusions about the first two elements regarding misconduct and causality, but we question the court's materiality analysis. Our Supreme Court made clear in *Martin* that the burden was on defendant to make a " 'plausible showing' " under federal law, or show a "reasonable possibility" under state law, that the witness would have given testimony that was material and favorable to the defense. (*Id*. at p. 32.) The trial court in the present case did not find that defendant met this burden. It merely stated that it was "not sure that the defense can show that the testimony would be favorable to his defense" and that, "[o]n the face of [Smith's email], it's quite possible that with appropriate inquiry it would have been found

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reason for admitting this tape and listening to the tape is that it consists of the best evidence of certain threats made by Detective Willett to the witness. [¶] In earlier proceedings, I have already ruled that these threats involved misconduct. However, the weight and significance of the misconduct will be for you to determine. [¶] We're not admitting this for the truth of the matter. We are admitting it for the words spoken.

The court also gave the jury this instruction: "It is improper in any criminal case for anyone to attempt to threaten or intimidate a potential witness. The actions of Detective Willett on July 21st, 2005, threatening the arrest of Jason Smith if he changed his statement from what he had said previously was improper and constituted misconduct as a matter of law. [¶] The misconduct of Detective Willett in threatening Jason Smith is a factor you may consider in evaluating the testimony of Jason Smith. The weight and significance of the evidence of misconduct is for you to determine."

that in fact there wasn't anything that was particularly favorable to the defense, that it dealt with extraneous matters and that his actual observations never changed." Nonetheless, after noting that what Smith would have said about the incident could not be determined because of Willett's misconduct, the trial court concluded that there was *Martin* misconduct. Thus, the trial court appears to have concluded that defendant was relieved of his burden of establishing "materiality" because of the government's misconduct. Nothing in *Martin* suggests this is appropriate.

Furthermore, while the trial court referred to an ambiguity in Smith's email to Links, it also stated that "on the face of it . . . it's quite possible that with appropriate inquiry it would have been found that in fact there wasn't anything that was particularly favorable to the defense, that it dealt with extraneous matters and that his actual observations never changed." We agree with this assessment of the record. Smith did not indicate that he was going to change his statement about what he actually witnessed. He stated in his email to Links, "I would never intentionally lie about anyone to get them into trouble with the law and I didn't feel I was doing that when I gave you my statement, but now that I've heard this new information about Maria the situation has changed." Similarly, in the first part of his telephone conversation with Willett, *before* Willett made any threats, Smith stated, "I saw what I saw, I thought I saw a rape being committed," and that while it "certainly looked like" a rape, "now I'm finding out that the girl involved has been actually been running around on her husband with the guy who I thought was raping her at the time." As the trial court correctly noted, however, Smith's interpretation of what he saw was not admissible.

We do not need to further address the trial court's misconduct finding pursuant to *Martin, supra,* 44 Cal.3d 1, because the remedies it ordered were sufficient to remedy the misconduct it found. The trial court was faced with different circumstances than those which faced the Supreme Court in *Martin*. Willett's misconduct was discovered before defendant's trial had begun, and there was not any significant indication that but for the misconduct, Smith would have testified more favorably to the defendant about what he had actually witnessed. Faced with this circumstance, the trial court's remedies ensured

defendant would have a fair trial by instructing the jury that misconduct had occurred, allowing it to hear the recorded phone call, and instructing the jury that it could consider the weight and significance of the misconduct in evaluating Smith's testimony. This allowed the jury to consider everything.

These remedies are consistent with the Supreme Court's analysis of remedies in *Martin, supra*, 44 Cal.3d 1. The prosecutorial intimidation of Martin's witnesses was of a more extreme nature than Willett's threats to Smith. Willett's misconduct was serious, but distinguishable from the conduct in *Martin.* Although he reminded Smith of his obligation to testify truthfully, his statements crossed the line into threats that could have led Smith to reasonably believe he would face negative legal consequences if his truthful testimony differed from his initial statement to police. However, Willett's misconduct comprised statements in one telephone call, which he made to shore up a witness's doubts about the significance of what he had witnessed after he had been influenced by information given to him by defendant's supporters about the victim's purported sexual history. On the other hand, the prosecutorial misconduct in *Martin* involved threats to multiple defense witnesses that they would be arrested if they implicated themselves in crimes in the course of their testimony, the actual arrest in public of the first defense witness immediately after he testified, and the loss of testimony that was favorable to Martin's case. The Supreme Court determined that dismissal was not appropriate in those more extreme circumstances. We also think that dismissal is an unnecessarily harsh remedy for the misconduct involved here, particularly given the lack of evidence that the misconduct resulted in the actual loss of any testimony favorable to defendant, and that the court's remedy included appropriate instructions to the jury regarding that misconduct. We also reach this conclusion for the same reasons regarding the requested exclusion of Smith's testimony, a remedy not considered in *Martin.*

Defendant, relying on *Morrow v. Superior Court* (1994) 30 Cal.App.4th 1252, *Boulas v. Superior Court* (1986) 188 Cal.App.3d 422, and *Barber v. Municipal Court* (1979) 24 Cal.3d 742, argues that dismissal of the case is necessary because otherwise state agents will have no incentive to refrain from such violations, because making threats

to a witness is an "insidious form of misconduct" which "undermines the truth seeking function which lies at the heart of the jury system," because the misconduct was by a police officer with the power to arrest the threatened witness, and because the prosecution cannot proceed with the use of testimony "tainted" by misconduct. He argues that at a minimum, Smith's testimony should be excluded to "assure that the prosecution did not benefit from Willett's misconduct." We disagree. "Dismissal is, on occasion, used by courts to discourage flagrant and shocking misconduct by overzealous government officials in subsequent cases." (*Boulas v. Superior Court*, *supra*, 188 Cal.App.3d at p. 429.) Again, while we agree that Willett's misconduct was serious, there is no real indication in the record that Smith's testimony was tainted by it, and the record indicates that Willett's misconduct occurred in a phone call to a witness who had expressed doubts about testifying after defendant's brother and friends had given him information. Willett's actions do not rise to the level of the flagrant and outrageous misconduct discussed in the cases defendant cites. (See *Morrow v. Superior Court*, *supra*, 30 Cal.App.4th at p. 1255 [prosecutor instructed investigator to eavesdrop on defendant's confidential discussions with an attorney in the courtroom's holding area]; *Boulas v. Superior Court*, *supra*, 188 Cal.App.3d 422, 425-429 [district attorney's office communicated with defendant outside of the presence of his counsel and instructed him to fire his attorney and hire new counsel acceptable to the office if he wanted to negotiate a deal]; and *Barber v. Municipal Court*, *supra*, 24 Cal.3d at pp. 745-750 [law enforcement agent posing as a protestor and codefendant attended numerous confidential attorney-client conferences, in which defense strategy was discussed].) Furthermore, the trial court's remedies, rather than allow the prosecution to benefit from Willett's misconduct, put the People's case at significant risk by permitting the jury to consider this misconduct. This provides sufficient incentive for investigators to avoid engaging in such misconduct in the future, and protects the truth-seeking function of our jury system.

In short, defendant's arguments are unpersuasive. The court's remedies were not error.[3]

III. *Restitution*

Defendant also argues that the trial court erred by ordering him to pay Maria Doe $21,748.64 in direct restitution as recommended by the probation officer. This argument also fails.

A. *The Proceedings Below*

Maria submitted a restitution claim form to the probation department for $21,748.64 for "docked wages" of $17,721 for 433.5 hours lost, based upon stated average hourly wages, and which included lost wages for her attending the trial; an August 2006 health premium that she paid to her employer; $1,296 for fuel and bridge tolls during the trial; $845 for medical care and prescription drugs; and $884 for child care during the trial. She provided documentation, and declared that her statements were correct under penalty of perjury. The probation department recommended that full restitution be ordered.

At the beginning of the restitution hearing, defense counsel stated, "I don't think we need a full-blown evidentiary hearing in this case." He then argued that Maria was not entitled under the governing statute, Penal Code section 1202.4, to her requested fuel and bridge toll, health premium and child care payments, or to lost wages beyond that due to injury, testifying during trial, or assisting the People in the investigation and prosecution of the case.

The prosecutor indicated that since "it seems like it's a legal issue," he was willing to submit on the papers. He argued that Maria was entitled to recover lost wages for mental and emotional injuries. He also argued that because the defense included multiple trial issues for which no discovery had been provided, his only redress was to consult with Maria during the trial. He gave specific examples, and stated that Maria "had to be

[3] In light of our conclusion, we do not address the parties' debate about whether or not the trial court committed harmless error.

here every day in order to deal with what was going on in that trial. . . . I'm representing that I communicated with her on a regular basis throughout the entirety of that trial in order to address the issues that were brought up from opening statement to basically the last witness who testified."

Defense counsel argued that Maria testified for only three days at the trial and, while he imagined she testified for two or three days at the preliminary examination and assisted in the prosecution and investigation of the case, her total time participating in these matters could not have added up to 53 days. Counsel argued that Maria did not have to be otherwise present at the proceedings, and could have consulted with the prosecutor by telephone. He agreed that "it's a legal issue," but added that since the People argued that Maria was required to be present for the entire trial to help assist the prosecution, should have provided some form of accounting that justified that the People needed her for all of the time Maria claimed in lost wages.

The prosecutor responded that the court should "take into account that when somebody is the victim of this type of crime, they're entitled to a certain amount of time off of work," and that, as Maria testified and said in her statement to the court, "after this event she basically became somewhat of a recluse. She couldn't believe it happened. . . . [¶] Surely, she's entitled to a certain amount of time to sort of mentally balance herself." He also represented that if the court desired, he could account "for every single witness who testified, as far as me consulting with her on a particular issue and coming back in based on our conversation, I'm sure that happened with the witnesses." This argument was not further pursued.

The court defined the legal issue as whether the reference to assisting the prosecution in section 1202.4, subdivision (f)(3) was broad enough to cover a circumstance where the victim, at her own choosing, "is present throughout the trial and the victim in fact provides assistance to the prosecution[.]" Counsel submitted the matter, and the court ruled that section 1202.4, subdivision (f)(3)(E) "provides for reimbursing the victim who chooses to attend court proceedings beyond the time spent as a witness voluntarily without request of the prosecution, but whose presence in fact

assists the prosecution, is entitled to the wages or profits lost." Based on that legal ruling, the documentation, and the probation officer's report and recommendation, the court ordered that Maria receive restitution in the amount requested.

B. *Discussion*

Victim restitution is a "constitutional mandate." (*People v. Giordano* (2007) 42 Cal.4th 644, 655.) "It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to restitution from the persons convicted of the crimes for losses they suffer. [¶] Restitution shall be ordered from the convicted persons in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss, unless compelling and extraordinary reasons exist to the contrary." (Cal. Const., art. I., § 28, subd. (b).)

Accordingly, the Legislature has provided in Penal Code section 1202.4 (section 1202.4) "that a victim of crime who incurs any economic loss as a result of the commission of a crime shall receive restitution directly from any defendant convicted of that crime" (§ 1202.4, subd. (a)(1)), and that "in every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court. . . . The court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so, and states them on the record." (§ 1202.4, subd. (f).) "To the extent possible," the restitution order "shall be of a dollar amount that is sufficient to fully reimburse the victim or victims for every determined economic loss incurred as the result of the defendant's criminal conduct, including, but not limited to" medical expenses, mental health counseling expenses, "[w]ages or profits lost due to injury incurred by the victim," and "[w]ages or profits lost by the victim . . . due to time spent as a witness or in assisting the police or prosecution." (§ 1202.4, subd. (f)(3)(B), (C), (D) & (E).) "The defendant has the right to a hearing before a judge to dispute the determination of the amount of restitution." (§ 1202.4, subd. (f)(1).)

"At the core of the victim restitution statutory scheme is the mandate that a victim who suffers economic loss is entitled to restitution and that the restitution is to be 'based on the amount of loss claimed by the victim.' Thus, a victim seeking restitution . . . initiates the process by identifying the type of loss (§ 1202.4, subd. (f)(3)) he or she has sustained and its monetary value." (*People v. Fulton* (2003) 109 Cal.App.4th 876, 885-886.) "Once the record contains evidence showing the victim suffered economic losses . . . this showing establishes the amount of restitution the victim is entitled to receive, unless challenged by the defendant." (*Id*. at p. 886.) "This approach complies with the statutory mandate that the amount of restitution is to be based on the 'loss claimed by the victim' and the designated right of the defendant to a hearing 'to dispute the determination of the amount of restitution.' " (*Ibid*.)

Restitution statutes are to be " 'interpreted broadly and liberally.' " (*In re Johnny M.* (2002) 100 Cal.App.4th 1128, 1132.) "The term 'economic losses' is thus entitled to an expansive interpretation." (*Id*. at p. 1133.) A trial court's restitution orders are reviewed for abuse of discretion. (*People v. Thygesen* (1999) 69 Cal.App.4th 988, 992.)

Defendant asserts that "[t]he primary question" is whether the wages Maria lost by attending the trial were lost " 'due to time spent as a witness or in assisting the police or prosecution' " within the meaning of section 1202.4, subdivision (f)(3)(E). He argues that it was not established that Maria's presence was needed, other than to testify, because there was no indication that the prosecutor "requested her to be present," and their consultations could have occurred by telephone.

Defendant's argument fails for a number of reasons. First, the trial court has broad discretion to award restitution, "including, *but not limited to*" participating as a witness and assisting the prosecution. (§ 1202.4, subd. (f)(3), italics added.) Therefore, defendant's arguments that the court's grant of restitution for lost wages due merely to trial attendance went beyond the scope of section 1202.4 fails. For this same reason, defendant's arguments that the victim was not entitled to travel, child care, or health care premiums incurred during her attendance at trial also fail.

Second, section 1202.4, subdivision (f)(3)(E) itself refers to "assisting the . . . prosecution" without further limitation; therefore, the issue of whether or not the prosecution specifically requested Maria's presence is not relevant as long as she in fact assisted, which was clear from the prosecutor's representations at the restitution hearing.

Third, defendant's argument that Maria could have assisted the prosecution by telephone asks us to reweigh the evidence, which we will not do under an abuse of discretion standard of review. Whether or not it was "necessary" for her to be present at trial, the court could reasonably rely on the prosecutor's representations about his constant consultations with her throughout the trial to order restitution.

In our own research, we have found two cases that are consistent with our analysis. In *People v. Crisler* (2008) 165 Cal.App.4th 1503, published after briefing was completed here, the appellate court held that lost wages, mileage, and parking fees incurred by parents of a murder victim while attending the trial "readily qualify as 'economic loss incurred as the result of defendant's criminal conduct,' since they would not have been incurred had defendant not murdered their son. [Citation.] It is entirely reasonable that the parents of a murder victim will attend the murder trial in an attempt to gain some measure of closure and a sense that justice has been done." (*Id*. at pp. 1505-1506, 1509.) "[R]egardless of whether section 1202.4, subdivision (f)(3)(E) specifically covers the parents' request . . . the trial court did not abuse its discretion in awarding restitution[.]" (*Ibid*.)

In *People v. Brasure* (2008) 42 Cal.4th 1037, the trial court accepted the probation officer's recommendation to approve the restitution claim by the murder victim's mother, who told the officer that she incurred $2,500 in expenses attending the trial and had lost approximately $100,000 in wages because she " 'has been unable to work for the past two years' " due to the trauma of her son's murder. (*Id*. at p. 1074.) Our Supreme Court rejected the contention that a restitution order was not authorized pursuant to section 1202.4, subdivision (f), because the mother's income loss resulted from a psychological, rather than a physical, injury. (*Id*. at pp. 1074-1075.)

Defendant next argues that "it appears from the record that much of the wages [Maria] sought restitution for were not based on" either wages lost because of injury, "time spent as a witness, or in assisting the police or prosecution." Defendant provides a detailed analysis of restitution claims that supposedly are not supported by the documentation. This argument fails because it ignores defendant's failure to meet his evidentiary burden below. Maria identified the type of loss she sustained and its monetary value, and submitted supporting documentation in her claim, which she made under penalty of perjury. Furthermore, while the hearing argument focused on Maria's assistance to the prosecution, it appears that Maria also sought restitution for lost wages as a result of her depression and dysfunction after March 27, 2005. She stated to the court at the sentencing hearing that the crime had caused her depression and psychological injury that negatively affected her ability to work, and the prosecutor referred to her statement in his argument at the restitution hearing. The court's restitution order was not necessarily limited to the time Maria spent assisting the prosecution, since the court also ruled based on the probation officer's report and the submitted documentation. Thus, the submissions and representations to the court "establish[ed] the amount of restitution the victim is entitled to receive, unless challenged by the defendant." (*People v. Fulton, supra,* 109 Cal.App.4th at p. 886.)

Defendant failed to effectively challenge the restitution sought. Other than challenging Maria's time spent assisting the prosecution at trial, to which the prosecution responded, defendant conceded the factual bases for Maria's restitution claim and did not establish that Maria made any factual errors in her statement, or would gain a "windfall" from her requested restitution, as he argues on appeal. While he now contends that there are factual errors that can be determined from the face of Maria's submitted documentation, undermining her claim regardless of his lack of objections below, he attempts to establish these contentions by referring elsewhere in the record himself.

In short, defendant failed to meet his evidentiary burden below; indeed his counsel indicated that a full evidentiary hearing was not necessary and characterized his arguments as raising legal questions. As the Supreme Court stated in *People v. Brasure*,

supra, 42 Cal.4th 1037, "by his failure to object, defendant forfeited any claim that the order was merely unwarranted by the evidence, as distinct from being unauthorized by statute." (*Id*. at p. 1075.)

Accordingly, we reject defendant's contention that the trial court erred based on his various contentions regarding the factual bases for Maria's claims.

DISPOSITION

The judgment is affirmed.

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Lambden, J.

We concur:

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Kline, P.J.

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Haerle, J.